

*[Handwritten signature]*

FEB 19 2003



CV 01 02213 #00000056

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BARBARA KAY DOREY

Plaintiff,

v.

GREEN RIVER SURGICAL CENTER,  
LTD., a Limited Partnership, *et al.*,

Defendants.

Case No. C01-2213L

ORDER REGARDING  
SUPPLEMENTAL JURISDICTION  
AND GRANTING IN PART AND  
DENYING IN PART MOTION FOR  
SUMMARY JUDGMENT

I. INTRODUCTION

On January 14, 2003, this Court issued an order (the "January 14 Order") (Dkt. # 48) granting summary judgment in favor of defendants Green River Surgical Center, *et al.* ("Green River") on plaintiff Barbara K. Dorey's ("Dorey") Americans with Disabilities Act, wrongful discharge in violation of public policy, and intentional and/or negligent infliction of emotional distress claims. The Court did not address Dorey's allegations of violation of the Washington Law Against Discrimination ("WLAD") for failure to accommodate and wrongful discharge, but rather requested that the parties submit brief memoranda regarding whether the Court should exercise supplemental jurisdiction on those remaining state law claims. Having considered the parties'

ORDER REGARDING SUPPLEMENTAL JURISDICTION  
AND GRANTING IN PART AND DENYING  
IN PART MOTION FOR SUMMARY JUDGMENT - 1

*1252*

*177*

*Sp*

1 submissions regarding that issue, the Court finds that the exercise of supplemental  
2 jurisdiction is appropriate and grants in part and denies in part Green River's motion for  
3 summary judgment on Dorey's WLAD claims.

## 4 II. SUPPLEMENTAL JURISDICTION

5 When all claims for which a federal court possessed original jurisdiction are  
6 eliminated, "the balance of factors will weigh toward remanding any remaining pendent  
7 state claims to state court." Harrell v. 20th Century Ins. Co., 934 F.2d 203, 205 (9th Cir.  
8 1991); see also 28 U.S.C. § 1367(c)(3) (permitting court to decline to exercise  
9 supplemental jurisdiction when all claims for which court possessed original jurisdiction  
10 are dismissed). However, where substantial judicial resources have already been  
11 committed and remanding would cause a duplication of effort, the district court may  
12 properly retain jurisdiction over state law claims. Schneider v. TRW, Inc., 938 F.2d 986,  
13 994-95 (9th Cir. 1991).

14 The Court has invested substantial time on this matter and is familiar with the  
15 factual and legal issues present in this litigation. Were the Court to remand the case to  
16 King County Superior Court, that effort would be duplicated. Judicial economy therefore  
17 favors the exercise of supplemental jurisdiction. Furthermore, with the exception of  
18 expert depositions, discovery has been completed. The Court therefore finds that  
19 exercising supplemental jurisdiction over Dorey's remaining state law claims is  
20 appropriate.

## 21 III. MOTION FOR SUMMARY JUDGMENT ON WLAD CLAIMS

### 22 A. Failure to Accommodate.

23 Dorey claims that Green River failed to accommodate her alleged disability.  
24 (Complaint ¶¶ 3.12, 4.5). "An accommodation claim presents essentially two issues: (1)

1 whether the employee was disabled or handicapped within the meaning of the Act; and  
2 (2) whether the employer met its affirmative obligation to reasonably accommodate the  
3 handicap.” Pulcino v. Federal Express Corp., 141 Wn. 2d 629, 640 (2000). Once an  
4 employee has given the employer notice of the disability, “[t]he employee has the burden  
5 of showing that a specific reasonable accommodation was available to the employer at  
6 the time the employee’s physical limitation became known and that the accommodation  
7 was medically necessary.” Id. at 643.

8 Assuming that Dorey was disabled under the WLAD, she has made no showing  
9 that Green River failed to accommodate her disability. The undisputed evidence before  
10 the Court demonstrates that Green River relieved Dorey from the circulating duties of the  
11 Director of Nursing position that purportedly were made impossible due to her fractured  
12 wrist. See, e.g., Nordsletten Decl. Ex. 2 (Dorey Dep.) at 278. Dorey sought no other  
13 medically necessary accommodation. Dorey’s arguments that, for example, “[b]y not  
14 providing her with her own workspace and computer . . . [it was] next to impossible to  
15 complete her tasks because of her disability” are not supported by evidence in the record  
16 before the Court. (Response at 19).

17 Because no genuine issue of material fact remains in dispute regarding whether  
18 Green River failed to provide a medically necessary accommodation to Dorey, summary  
19 judgment in Green River’s favor on Dorey’s failure to accommodate claim is appropriate.

20 **B. Wrongful Termination.**

21 As noted by the parties, when considering a wrongful discharge claim pursuant to  
22 the WLAD, Washington courts utilize the McDonnell Douglas burden-shifting method.  
23 Hill v. BCTI Income Fund-I, 144 Wn. 2d 172, 180 (2001) (citing McDonnell Douglas  
24 Corp. v. Green, 411 U.S. 792 (1973)). Under the McDonnell Douglas protocol, the

1 plaintiff must first set forth a prima facie case of unlawful discrimination. Id. at 181. If  
2 the plaintiff establishes a prima facie case, the burden then “shifts to the defendant to  
3 produce admissible evidence of a legitimate, nondiscriminatory explanation for the  
4 adverse employment action sufficient to ‘raise a genuine issue of fact as to whether the  
5 defendant discriminated against the plaintiff.’” Id. (citation omitted). If the defendant  
6 produces such evidence, the burden shifts back to the plaintiff who must produce  
7 evidence that the defendant’s proffered reason for the adverse action was pretextual. Id.  
8 at 185-86. “Once a court determines that the parties have met all three McDonnell  
9 Douglas intermediate burdens and that the record contains *reasonable but competing*  
10 inferences of *both* discrimination *and* nondiscrimination, ‘it is the jury’s task to choose  
11 between such inferences.’” Id. at 186 (quoting Carle v. McChord Credit Union, 65 Wn.  
12 App. 93, 102 (1992)) (emphasis in original).

13 The parties provided differing definitions of the elements of a prima facie case of  
14 disability discrimination. Green River, citing Cluff v. CMX, 84 Wn. App. 634, 637  
15 (1997), states that a prima facie case is demonstrated by “(a) the presence of a handicap;  
16 (b) satisfactory performance of job functions; (c) replacement by a person outside the  
17 protected group; and (d) that her alleged handicap was the reason for the discharge.”  
18 (Motion at 13). Dorey, citing Chen v. State, 86 Wn. App. 183 (1997), states that “[f]irst,  
19 the Plaintiff must present evidence that she was handicapped, (2) she was discharged[,]  
20 (3) that she had done satisfactory work[,] and (4) she was replaced by a person who was  
21 not handicapped.” (Response at 10). The difference between these two sets of elements  
22 is that Green River’s set requires the plaintiff to show that the alleged disability was the  
23 reason for the discharge, while Dorey’s test requires only discharge. The difference in  
24 the two definitions and the apparently inconsistent case law appears to stem from the

1 definition of “disability” adopted by the Washington State Human Rights Commission.  
 2 However, in this matter that problematic definition is ultimately unimportant for reasons  
 3 described below.

4 The Human Rights Commission definition of “disability” is to be given “great  
 5 weight since it is the construction of the statute by the administrative body whose duty it  
 6 is to administer its terms.” Doe v. Boeing Co., 121 Wn. 2d 8, 15 (1993). The Human  
 7 Rights Commission regulations provide:

- 8
- 9 (1) ‘Disability’ is short for the term ‘the presence of any sensory,  
 mental, or physical disability,’ except when it appears as part of the  
 full term.
  - 10 (2) ‘The presence of a sensory, mental, or physical disability’ includes,  
 but is not limited to, circumstances where a sensory, mental, or  
 11 physical condition:
    - 12 (a) Is medically cognizable or diagnosable;
    - 13 (b) Exists as a record or history;
    - 14 (c) Is perceived to exist whether or not it exists in fact.
- 15 A condition is a ‘sensory, mental or physical disability’ if it is an  
 16 abnormality and is a reason why the person having the condition did  
 17 not get or keep the job in question, or was denied equal pay for equal  
 work, or was discriminated against in other terms and conditions of  
 employment, or was denied equal treatment in other areas covered  
 by the statutes. In other words, for enforcement purposes a person  
 will be considered to be disabled by a sensory, mental or physical  
 condition if he or she is discriminated against because of the  
 condition and the condition is abnormal.

18 ...

19 WAC § 16-22-020.

20 This definition of “disability” is problematic in the context of the McDonnell  
 21 Douglas analysis because to meet the “presence of handicap” element of the tests set  
 22 forth by both parties (and, provided the other elements are met, meet the first step of the  
 23 McDonnell Douglas analysis), a plaintiff necessarily must also produce evidence that the  
 24 adverse action occurred because of the alleged disability (the third step of the McDonnell

1 Douglas analysis). The Washington State Supreme Court has recognized the difficulties  
2 the Human Rights Commission definition of disability causes in the context of the  
3 McDonnell Douglas analysis, but has not yet had the opportunity to remedy this issue.  
4 See BCTI Income Fund, 144 Wn. 2d at 192 n.19 (noting that the Human Rights  
5 Commission definition “makes it impossible for plaintiffs to satisfy their first  
6 intermediate [McDonnell Douglas] burden without simultaneously producing evidence in  
7 support of their ultimate allegation, namely that the adverse action occurred because of  
8 that alleged disability. . . . There is no principled reason why it should be fundamentally  
9 harder to establish prima facie cases of disability discrimination under RCW 49.60.180  
10 than prima facie cases of any other form of discrimination made unlawful by that same  
11 statute.”).

12 However, in this instance it does not matter that Washington law appears to  
13 require a plaintiff claiming disability discrimination to meet a higher prima facie case  
14 standard than plaintiffs asserting other forms of discrimination. This is because, as  
15 explained below, Green River meets the second McDonnell Douglas step of providing  
16 “evidence of a legitimate, nondiscriminatory explanation for the adverse employment  
17 action sufficient to ‘raise a genuine issue of fact as to whether the defendant  
18 discriminated against the plaintiff.’” BCTI Income Fund, 144 Wn. 2d at 181 (citation  
19 omitted). Therefore to survive summary judgment Dorey must provide evidence that the  
20 proffered reason for the adverse action was pretextual. In this matter whether that occurs  
21 in the first or third step of the McDonnell Douglas analysis is inconsequential.

22 Dorey states that “there is no dispute that the Plaintiff was handicapped, was  
23  
24

1 discharged and was replaced by a person who was not handicapped.”<sup>1</sup> (Response at 10).  
2 Dorey is incorrect in asserting that Green River does not dispute that Dorey was disabled.  
3 See Motion at 13 n.15. However, viewing the evidence before the Court in the light most  
4 favorable to Dorey, the non-moving party on this motion for summary judgment, the  
5 Court finds that Dorey has provided sufficient evidence to establish the disability element  
6 of a prima facie case of disability discrimination.

7 Green River argues that the evidence on record conclusively demonstrates that  
8 Dorey was not satisfactorily performing the essential functions of her job. See Motion at  
9 14-16. Green River cites complaints regarding Dorey’s allegedly negative demeanor,  
10 lack of leadership, and unavailability. Id. at 15. Dorey responds by directing the Court  
11 to evidence that improvements in her job performance had been acknowledged and that a  
12 reference letter indicated that she had been terminated for budgetary reasons. (Response  
13 at 10-12). Given this factual dispute the Court declines to find that Dorey has not met the  
14 satisfactory performance element of a prima facie case of disability discrimination.

15 Due to the Human Rights Commission definition of “disability,” the Court now  
16 considers whether Dorey has provided evidence that she was fired due to her alleged  
17

---

18 <sup>1</sup>In support of this statement, Dorey provided a footnote that states: “Put in cite for  
19 Lori McMann’s dep where she says the people who replaced her were not handicapped.”  
20 A court is not obligated to consider matters not specifically brought to its attention, even  
21 if helpful evidence is located somewhere in the record. Frito-Lay, Inc. v. Willoughby,  
22 863 F.2d 1029, 1034 (D.C. Cir. 1988). Therefore a party opposing summary judgment  
23 must designate and reference specific triable facts. Id. Although a Court is not obligated  
24 to search the record for evidence in support of a party’s argument (and, the Court having  
25 examined the record, there appears to be no evidence before the Court to support this  
26 point), as Green River has not challenged this point in its Motion or Reply, there appears  
to be no dispute over this element. Dorey is cautioned, however, to exercise diligence in  
her submissions to this Court.

1 disability. As noted, supra, if this element is met Dorey necessarily fulfills the third step  
2 of the McDonnell Douglas inquiry.

3 The only evidence that supports Dorey's allegation that she was terminated due to  
4 disability consists of the allegedly repeated statements by her supervisor, Lori McMann,  
5 that Dorey would not have been hired if McMann had known that she was going to suffer  
6 a wrist injury. (Response at 6 (citing Cordes Decl. Ex. A (Dorey Dep.) at 185 and  
7 Cordes Decl. Ex. D (Smothers Dep.) at 59-60). Green River contends that if McMann  
8 made such statements, they constituted mere "stray remarks" insufficient to support a  
9 claim of disability discrimination. (Reply at 8). Although the Court recognizes that this  
10 appears not to be particularly strong evidence of Green River's allegedly improper  
11 motivation for firing Dorey, the Court finds that Dorey has established a prima facie case  
12 of disability discrimination and has put forth sufficient evidence of pretext to preclude  
13 summary judgment.<sup>2</sup>

#### 14 IV. CONCLUSION

15 For the foregoing reasons the Court exercises supplemental jurisdiction over  
16 Dorey's remaining state law claims. The Court GRANTS IN PART Green River's  
17 motion for summary judgment (Dkt. # 34) with respect to Dorey's accommodation claim  
18 under Washington Law Against Discrimination and DENIES IN PART Green River's  
19 motion with respect to Dorey's wrongful termination claim under the Washington Law  
20  
21  
22

---

23 <sup>2</sup>Green River has submitted ample evidence of a nondiscriminatory reason for  
24 Dorey's termination to meet the second step of the McDonnell Douglas burden-shifting  
process.

1 Against Discrimination.<sup>3</sup> Within 10 days of the date of this Order the parties are directed  
2 to contact Teri Roberts, the Court's Judicial Assistant, at 206-553-2673 regarding  
3 scheduling of trial and related dates. The Clerk of the Court is directed to send copies of  
4 this Order to all counsel of record.

5  
6 DATED this 19<sup>th</sup> day of February, 2003.

7  
8   
9 Robert S. Lasnik  
United States District Judge

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23 <sup>3</sup>In its motion for summary judgment Green River seeks summary resolution of  
24 certain issues regarding damages. See Motion at 20-23. The Court declines to address  
those issues at this time.

25 ORDER REGARDING SUPPLEMENTAL JURISDICTION  
26 AND GRANTING IN PART AND DENYING  
IN PART MOTION FOR SUMMARY JUDGMENT - 9